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No. 177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ROADWAY EXPRESS, INC., ALL STATES FREIGHT, INC., TERMINAL TRANSPORT, INC., TRANSAMERICAN FREIGHT LINES, INC., EASTERN EXPRESS, INC., OVERNITE TRANSPORTATION COMPANY, UNITED STATES RUBBER COMPANY, *Appellants*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the District of Delaware

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

ARTHUR, DRY, KALISH, TAYLOR & WOOD
1230 Sixth Avenue
Rockefeller Center
New York 20, New York

HOWELL ELLIS
616-618 Fidelity Building
111 Monument Circle
Indianapolis 4, Indiana

HOMER S. CARPENTER
JOHN C. BRADLEY
618 Perpetual Building
Washington 4, D. C.

Attorneys for Appellants

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In their motions to affirm, both the Government and the motor carrier appellees support a version of motor carrier certificate interpretation which they admit was motivated by the desire of the Interstate Commerce Commission to reach a compromise between the interests of two competing segments of the industry. They reject the principle that interpretation of a certificate should be consistent with the reasons for drafting it as it was in the first instance and the purpose sought

to be attained thereby. They rely upon theories which have no rational basis, and no support in precedent.

Moreover, appellees insist that the Commission may refuse alternatively to grant to appellant carriers the specific right to provide the transportation of containers even though by such refusal the Commission did force upon the shipping public the service of a class of carriers shown by its own findings to be ill-equipped and unable to provide efficient and economic transportation of "Sealdtank" and "Sealdrum" containers.[1]

If the Commission's decisions below are permitted to stand, there will thus be affirmed an approach to regulation of the motor carrier industry which would deny to literally thousands of general freight carriers their right to logical and reasonable use of their vehicles, which would discourage invention and progress in the art of motor carrier transportation, and which would deny to the shipping public its right to efficient and economic service.

Appellees contend that the Commission's decision must stand unless shown to be "clearly irrational." However, the law places a greater responsibility upon the Commission than mere avoidance of irrationality. Instead, there must be clearly set forth in its decision a rational basis upon which to found the conclusions reached by the Commission.[2] Furthermore, the de-

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[1] The words "Sealdtank" and "Sealdrum" are trade names registered by appellant United States Rubber Company.

[2] *Gilbertville Trucking Co.* v. *United States*, — U.S. —, 9 L. ed. 2d 177 (1962); *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282, 287 (1934); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939); *Burlington Truck Lines* v. *United States*, — U.S. —, 9 L. ed. 2d 207, 214 (1962).

tailed findings in its report must support without fundamental conflict the basis or bases adopted. The decisions of the Commission below are defective in both respects.

Underscoring these defects is the failure of the Commission to dispose of the cases before it in accordance with the mandate of the National Transportation Policy.[3] The policy requires that the Commission "recognize and preserve the inherent advantages of each" mode of transportation, promote "economical and efficient service," and "encourage the establishment and maintenance of reasonable charges * * *." The decisions below are in utter and obvious conflict with the objectives of the National Transportation Policy and the Commission has not specified in terms clear to the parties or to a reviewing court any basis upon which it can be said that the requirements of the National Transportation Policy have been met.[4]

The only limitations upon the type of service which appellants as general commodity carriers are author-

[3] 49 U.S.C. preceding Section 1.

[4] Appellee motor carriers in their motion, page 11, seek to avoid the impact of this issue by contending that, since these appellants have continuously pointed to the conflict between the National Transportation Policy and the Commission's decisions, the Commission must have given the issue consideration, and, therefore, the failure of the decisions to articulate the ground upon which the conflict might be resolved presents no error. Had the appellants failed to assert the conflict, we may assume that appellees would now contend that the right to argue the issue had been waived. Be that as it may, this Honorable Court has required somethir more from the Commission than the standard for which appellees argue. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957); *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

ized to provide are those specifically imposed in the operating certificates granted to them.[5] As here pertinent there are two such service limitations. One prevents the transportation of "commodities in bulk" form. The other prevents the hauling of those "commodities requiring special equipment."

Literally speaking, when a shipper fills his own "Sealdtank" container with a liquid commodity and thereafter tenders the entire "package" to a carrier for transportation, it cannot logically be said that the carrier receives the commodity in bulk form. Clearly it is in a container—here a "Sealdtank" container. No special equipment is required to transport it. Only ordinary equipment of the kind which make up the vehicle fleets of general commodity carriers is suited to the transportation of such containers.[6]

However, the Commission has never made a practice of interpreting literally the so-called "usual exceptions" in general commodity certificates. Traditionally it has based such interpretations upon the *reason* why an exception was devised in the first instance. The Commission has said that the "usual exceptions" in general commodity certificates were meant to identify some area of transportation activity *required of the carrier*, either vehicles of a kind not included among those normally used or held out by a general freight carrier or some incidental equipment or corollary service similarly of an unusual nature. In one of the decisions here assailed the Commission specifically ac-

[5] *Coastal Tank Lines, Inc.* v. *Pioneer Trucking Corp.*, 79 M.C.C. 101, 103 (1959); *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 301-302 (1948).

[6] J.S. 99a.

knowledged the real reason why the concept of the "usual exceptions" was invoked, stating:

> "* * * The reason why general-commodity carriers have historically been excluded from transporting the classes of commodities described by these exceptions is well summarized in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, at page 268:
>
> > 'The motor carriers of general commodities were not in the early stages of their development, and generally are not now *equipped* to handle dangerous explosives, money, securities, or other articles of very high value, household goods, sand, coal, and other commodities which usually move loose in bulk, or any commodity which *requires the use of equipment not ordinarily used in the movement of packaged or dry freight*. Prior to the enactment of the Motor Carrier Act, previously referred to, the motor common carrier, insofar as interstate commerce was concerned, had no legal duty to transport all the traffic tendered to it, and consequently its holding out fell into well-defined channels. It transported *such commodities only as would readily load onto its equipment* without damage to other lading or to equipment and which would not exceed the carrying capacity of its vehicle. With the passage of the Motor Carrier Act, motor common carriers were permitted to continue such operations as they conducted on the critical date and continuously thereafter. The exceptions then as now reflect the general-commodity carriers' self-imposed limitations.'[7] (emphasis supplied)

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[7] *Western Exp. Co. Extension—Scaldtanks*, 84 M.C.C. 585 (1961) [J.S. 51a].

In recognition of the acknowledged origins of the "usual exceptions" the Commission in literally dozens[8] of cases has ruled that so long as the service *required of the carrier* does not involve extraordinary vehicles, equipment or services not a part of the general freight carrier's normal holding out, the resulting transportation service is authorized regardless of the existence of any "usual exception." Even where a large and bulky article requires use of special loading equipment, so long as it is provided and operated by the consignor and/or the consignee—rather than the carrier—the "special equipment" exception does not apply.[9]

These precedents and their underlying principles the Commission would now disregard. It has said that if one of the appellant carriers transports its own ordinary trailer upon which a consignor has placed a filled container the carrier has been called upon to perform an ordinary, non-special, and fully authorized service. But if the shipper for reasons of efficiency and economy chooses to alter the sequence of the filling of the container and the loading of it upon the vehicle, the subsequent hauling service is that of a tank truck operator and thus of a specialized kind denied to appellant general freight carriers. Clearly the carrier in either situation provides the same equipment, performs the

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[8] See, for example, *American Red Ball Transit Co., Inc.* v. *McLean Trucking*, 67 M.C.C. 305, 315 (1956); *Armored Motor Service Co., Inc., Ext.—Coin and Bullion*, 69 M.C.C. 609, 613 (1957); *Alterman Transport Lines, Inc. Extension—Aluminum*, 83 M.C.C. 305, 308 (1960).

[9] *W. J. Dillner Transfer Co.—Investigation of Operations*, 79 M.C.C. 335, 356 (1959); *Dallas & Mavis Forwarding Co., Inc., Ext. —Galion, Ohio*, 79 M.C.C. 285, 292 (1959); *Bennett Common Carrier Application*, 82 M.C.C. 353, 358 (1960); *Dealers Transit, Inc., Extension—Radioactive Waste*, 88 M.C.C. 375, 379 (1961).

same acts, and thus is called upon to provide the same service. The distinctions upon which the Commission's interpretation is based are no distinctions at all. As a consequence the entire fabric of reasoning relied upon by the Commission to support its certificate interpretation is ineffective.

In a desperate effort to defend the Commission's theory, appellees imply that general commodity carriers are limited to the transportation of relatively small "packages" and contend that a carrier taking possession of a container filled by the consignor after placement[10] on the vehicle thereby receives the contents in bulk. This attempt to justify the Commission's interpretation is riddled with fallacies.

First, appellant carriers are not restricted to the transportation of small packages. The Commission has held that general commodity carriers can lawfully transport a single item or "package" weighing 31,000 pounds,[11] or a 20 ton container,[12] so long as the shipper loads the item upon the trailer. And unquestionably in the circumstances involved in this case, the consignor provides the loading.[13]

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[10] The Government erroneously suggests (page 3 of its motion) that a collapsed "Sealdtank" container can be first tied to a trailer and then filled. Only *after* filling may the container be tied down for transportation. The Commission's theory of "premounted" containers is thus faulty, in that the "Sealdtank" container, as with lumber, steel rods, machinery, or other general freight, is simply tied to the vehicle for safety during transportation.

[11] *International Transport, Inc., Extension—Winona, Minn.*, 82 M.C.C. 1 (1959).

[12] *Dealers Transit, Inc., Extension—Radioactive Waste*, supra.

[13] J.S. 37a, 79a-80a.

Second, quite clearly the carrier takes possession of the same "package" and contents regardless of the procedure by which someone else, the consignor, may have prepared it for shipment, and the same transportation service is required of the carrier. Yet, the Commission illogically found a distinction.

Third, a carrier taking possession of a filled container, regardless of where or when it was filled, does not receive the contents of the container in bulk form. When received, the contents are "packaged" in the shipper's container.

In an effort to justify its conclusions, the Commission itself contended that an ordinary trailer used to transport a container filled after loading is the "practical equivalent" of a tank vehicle. Appellants admittedly cannot lawfully utilize tank vehicles but they can use an ordinary van. And clearly an ordinary van is nothing more than just that. No change or modification of it is accomplished by reason of the lading temporarily placed upon it, or, for that matter, by the means chosen by a shipper for filling a container placed by the shipper on the vehicle and, after transportation, removed by the consignee. As a further indication of the irrationality of the Commission's erroneous interpretation, the carrier's *completed transportation* service can be *changed* from what the Commission calls a non-specialized service to what it calls a specialized service merely by the procedure by which the consignee elects to remove the container and its contents from the non-specialized vehicle used to transport it.

The foregoing emphasizes the defects in the Commission's decisions and its failure to set forth a rational basis to support its own conclusions. The same con-

siderations are present in the Commission's treatment of the issue of public convenience and necessity, i.e., whether, assuming the validity of its interpretation, appellant carriers should be certificated to permit uninhibited transportation of "Sealdtank" containers and other collapsible or "stackable" containers for the shipping public. That such a service is *needed* by the shipping public was made the subject of a specific finding:

> "Here a definite prospective need on the part of the shipping public for motor common carrier transportation of flowable, fungible commodities in C & S containers in quasi-bulk-type service has been shown."[14]

The Commission then found that, since the tank truck operators (including the motor carrier appellees) had *expressed* a "willingness and ability"[15] to transport the containers, the shipping public did not *need* the services of the general freight carriers. This conclusion was reached in direct conflict with the following findings:

> "The vast majority of the tank protestants do not operate the conventional van or flatbed equipment necessary for efficient transportation of C & S container traffic, and with few exceptions they have published tariff minima of 4,000 gallons

[14] J.S. 102a.

[15] In their motion, appellee carriers contend (page 13) that tank carriers were shown to be serving shippers of "Sealdtanks", citing J.S. 49a, 98a. Appellees neglect to point out that there were only two such instances shown of record. One involved P. B. Mutrie Motor Transportation, Inc., which is both a *general commodity* and a tank carrier and—in the former capacity operates ordinary vehicles (J.S. 48a-49a). The other was a carrier which had to rely upon the shipper to furnish the ordinary vehicle (J.S. 98a).

> or 28,000 pounds applicable to their transportation of less-than-truckload quantities of authorized commodities. Also, for the most part, they do not have the benefit of return payloads in their operations, meaning than on an average between 40 and 50 percent of their line-haul mileage involves deadhead transportation, a factor reflected in the basic rate structure not only of protestants, but of all motor tank carriers."[16]

As seen, the Commission has concluded that appellant carriers should not be specifically authorized to transport "Sealdtank" containers and their contents in what is called "quasi-bulk" service on the theory that specialized tank carriers can and will provide the transportation found to be needed. The Commission thus would require the shipping public, including specifically appellant United States Rubber Company:

(1) To seek service from a type of carrier which the Commission itself found did not operate the kind of vehicles needed to transport a container.[17]

(2) To pay truckload rates imposed by the almost uniform high tariff minima upon all shipments, regardless of size, and including those of the small less truckload kind.

(3) To pay rates fixed at a level to compensate for the empty or "deadhead" return movement of the vehicle.

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[16] J.S. 99a.

[17] This finding alone should have been sufficient to alert the Commission to its error on the interpretation issue which it decided by concluding that the class of carriers traditionally operating the kind of vehicles needed was not authorized to do so, but that the class of carriers authorized to do so did not operate the kind of equipment needed.

The Government's motion suggests, somewhat vaguely, that the shipper thus confronted with an artificially high transportation cost has "adequate remedies under the Act." However, the deadhead factor in the operations of tank carriers is an *inherent* characteristic and is not something which can be cured by issuance of a maximum rate order. The Commission is without the power to impose a confiscatory rate structure. Tank carriers traditionally experience enormous deadhead mileage because of the specialized nature and limited variety of the commodites they haul. On the other hand, the general commodity carrier uses his conventional vehicles to transport almost any "general commodity," i.e., any freight which will help balance his operation and hold to a minimum his empty mileage factor. The general commodity carrier has a proven ability to base rates on balanced[18] movements and loaded miles. The Commission's report contains findings indicating the availability of a lower rate structure in general commodity service.[19]

The Commission's conclusions on the certification issue not only lack a rational basis of support in the discussion of the evidence, but also are in direct conflict with those crucial findings by the Commission enumerated above. No attempt was made in the decisions to establish any grounds for reconciling the illogical conclusions with the conflicting findings. An order which is in plain opposition to the Commission's find-

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[18] See J.S. 46a.

[19] See J.S. 47a, 94a, 95a, 96a, 97a, 98a.

ings cannot be permitted to stand.[20] The Commission did not "articulate any rational connection between the facts found and the choice made."[21]

Judge Wright in his dissent observed that:

> "At worst, the ICC has ignored certain relevant portions of the National Transportation Policy. It is reasonable to conclude that the Commission has failed to evaluate the rate factor and others under the "economical and efficient service" heading. At best, though conflict is apparent and decision may be contrary to the public interest, it *is extremely difficult, if not impossible, to follow the ICC's reasoning.* Both alternatives justify reversal."[22] (Emphasis supplied)

Judge Wright has succinctly stated an accurate judicial appraisal of the two decisions of the Interstate Commerce Commission.

CONCLUSION

It is clear that the issues before this Court are of tremendous importance in the regulation of the motor carrier industry and to the shipping public. They war-

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[20] *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U.S. 80, 96 (1931). Moreover, the Commission cannot be sustained if the reasons specified are insufficient justification for its actions. *American Trucking Assos.* v. *United States, I. C. C.*, 364 U.S. 1, 14 (1960); *Eastern-Central M. C. Asso.* v. *United States*, 321 U.S. 194, 210 (1944).

[21] *Burlington Truck Lines* v. *United States*, supra, at page 216.

[22] J.S. 29a.

rant plenary consideration. The judgment of the District Court should be reversed.

Respectfully submitted,

ARTHUR, DRY, KALISH, TAYLOR & WOOD
1230 Sixth Avenue
Rockefeller Center
New York 20, New York

HOWELL ELLIS
616-618 Fidelity Building
111 Monument Circle
Indianapolis 4, Indiana

HOMER S. CARPENTER
JOHN C. BRADLEY
618 Perpetual Building
Washington 4, D. C.
Attorneys for Appellants

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